

STATE OF MICHIGAN  
COURT OF APPEALS

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KEVIN ADELL,

Plaintiff-Appellant,

v

ARNOLD SCHAFER and SCHAFER &  
WEINER, PLLC,

Defendants-Appellees.

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UNPUBLISHED  
February 28, 2006

No. 264730  
Oakland Circuit Court  
LC No. 2004-061913-NM

Before: Donofrio, P.J., and Murphy and Kelly, JJ.

PER CURIAM.

Plaintiff appeals as of right the trial court's order granting summary disposition in defendants' favor. Plaintiff also appeals the trial court's order denying plaintiff's motion to amend his complaint to add a claim for breach of fiduciary duty. We affirm.

I. Facts

Defendants represented plaintiff in connection with plaintiff's filing of an involuntary petition for bankruptcy against John Richards Homes Building Company ("JRH"). The bankruptcy court determined that plaintiff was ineligible to file the petition, and that he filed it in bad faith. Accordingly, the bankruptcy court awarded JRH \$6,413,230.68 in compensatory and punitive damages, attorney fees and costs. *In re John Richards Homes Bldg Co, LLC*, 291 Bankr 727 (ED Mich, 2003) (*JRH I*).

Plaintiff appealed the bankruptcy court's judgment to the federal district court, asserting, among other things, that his reliance on the advice of counsel in filing the petition negated any finding of bad faith. The district court determined otherwise, explaining that, while reliance on counsel may be considered, a client reasonably relies on an attorney's advice only when the client provides to the attorney all of the pertinent facts in the client's possession, which plaintiff failed to do. The court further added that plaintiff proceeded with the wrongful intent to intimidate JRH's owner into a settlement and, when that failed, to damage or destroy his business. *In re John Richards Homes Building Co, LLC*, 312 BR 849 (ED Mich 2004) (*JRH II*).

Thereafter, plaintiff filed this malpractice action alleging that defendants had provided him with substandard representation. Defendants moved for summary disposition asserting that

the rulings in *JRH I* and *JRH II* collaterally estopped plaintiff from bringing the action. The trial court agreed, and dismissed plaintiff's complaint.

## II. Analysis

### A. Collateral Estoppel

Plaintiff first contends that the trial court erred in granting summary disposition in defendants' favor on the basis of collateral estoppel. We disagree. We review de novo a trial court's decision on a motion for summary disposition. *Dressel v Ameribank*, 468 Mich 557, 561; 664 NW2d 151 (2003). The question of the applicability of collateral estoppel is a question of law also reviewed de novo. *McMichael v McMichael*, 217 Mich App 723, 727; 552 NW2d 688 (1996).

Generally, collateral estoppel precludes relitigation of an issue in a subsequent, different cause of action between the same parties when the prior proceeding culminated in a valid final judgment and the issue was actually litigated and necessarily determined in that prior proceeding. *Ditmore v Michalik*, 244 Mich App 569, 577; 625 NW2d 462 (2001). However, "the lack of mutuality of estoppel should not preclude the use of collateral estoppel when it is asserted defensively to prevent a party from relitigating an issue that such party already had a full and fair opportunity to litigate in a prior suit." *Monat v State Farm Ins Co*, 469 Mich 679, 691-692; 667 NW2d 843 (2004). Thus, a defendant-attorney in a malpractice action may assert collateral estoppel where the effectiveness or competency of the defendant's representation has already been determined in another proceeding. *Alterman v Provizer*, 195 Mich App 422; 491 NW2d 868 (1992); *Knoblach v Kenyon*, 163 Mich App 712, 725; 415 NW2d 286 (1987).

Plaintiff argues that the issue whether defendant provided competent representation in the bankruptcy matter was not fully and fairly litigated in the those proceedings, noting that the bankruptcy court imposed a four-hour time limit on each parties' presentation. An examination of the decisions in *JRH I* and *JRH II* lead us to conclude otherwise. In *JRH I*, the bankruptcy court considered numerous exhibits and extensive testimony from a number of parties bearing on plaintiff's conduct and motivations in filing the involuntary petition. Plaintiff did not raise the time limitation in his appeal of the bankruptcy court's judgment to the district court, nor does he indicate that he has done so in his appeal of those judgments to the United States Court of Appeals for the Sixth Circuit. Further, plaintiff does not identify any evidence or testimony he would have presented in the absence of this limitation that would render the opinions of the federal courts unsound. Thus, there is no basis for plaintiff's assertion that the time limit denied him a full and fair opportunity to litigate this issue before the bankruptcy court.

Plaintiff does not dispute that he had the incentive in the bankruptcy proceeding to obtain a full and fair adjudication as to whether he filed the involuntary petition against JRH in bad faith, or whether, alternatively, he filed in reliance on the advice of counsel, whom he contends he fully and properly informed of the pertinent circumstances surrounding his claim against JRH. Two federal courts have determined that plaintiff manipulated defendants through repeated assurances that a portion of the claim against JRH was undisputed in order to ensure that they would file the petition and that he had improper, bad faith motives for doing so. Plaintiff has, and has exercised his right to appeal those decisions. No new determination is merited by any difference in procedures or burden of proof, nor by any change in law or circumstances. Further,

contrary to plaintiff's assertion, "the applicable legal context" has not shifted since the federal court opinions were rendered, as a result of plaintiff's alleged discovery of evidence indicating that defendants' were aware before the petition was filed that JRH was contesting plaintiff's claim underlying that petition in the state court litigation pending between JRH and plaintiff. The basis of the decisions in *JRH I* and *JRH II* was not that defendants did not know that JRH was contesting the lawsuit filed by plaintiff in the state court, but rather that plaintiff repeatedly assured defendants that JRH would admit to owing plaintiff a sufficient amount, less than plaintiff's total claim in the state court action, to justify the filing of the involuntary petition, and further, that plaintiff intentionally misled defendants in that regard to ensure that they would file the petition. Therefore, application of collateral estoppel is appropriate in this case.

Moreover, plaintiff is collaterally estopped from asserting that any reliance on defendants' advice caused the award of damages against him in the JRH bankruptcy matter. The opinions in *JRH I* and *JRH II* clearly indicate that the award against plaintiff resulted solely from his own improper motives and conduct, irrespective of any reliance on the advice provided by defendants. Those decisions preclude plaintiff from relitigating causation in this case. The trial court did not err in granting defendants' motion for summary disposition.

#### B. Motion to Amend

Plaintiff also asserts that the trial court abused its discretion in denying his motion to amend his complaint to add a count alleging breach of fiduciary duty. We disagree. This Court reviews the trial court's denial of a motion to amend the complaint for an abuse of discretion. *Wymers v Khera*, 454 Mich 639, 654; 563 NW2d 647 (1997). A trial court should freely grant leave to amend a complaint whenever justice so requires, but may deny leave if amendment would be futile. *Hakari v Ski Brule, Inc*, 230 Mich App 352, 355; 584 NW2d 345 (1998). An amendment would be futile if, ignoring the substantive merits of the claim, it is legally insufficient on its face. *Id.*

Plaintiff asserts that defendants owed and breached certain fiduciary duties after the conclusion of their formal attorney-client relationship. Assuming without determining that there exists a separate cause of action for breach of fiduciary duty in this case, such a claim sounds in tort, *Miller v Magline, Inc*, 76 Mich App 284, 313; 256 NW2d 761 (1977). To state a legally cognizable claim, plaintiff must establish that he was injured as a result of the alleged breach. *Lumley v University of Michigan Bd of Regents*, 215 Mich App 125, 130; 544 NW2d 692 (1996). The opinions in *JRH I*, and *JRH II* make clear that plaintiff's own improper motives in filing the petition against JRH resulted in the bankruptcy court's award against him. Thus, plaintiff cannot establish that any breach by defendants caused his damages and his proposed claim for breach of fiduciary duty failed to state a cognizable legal claim. Therefore, the trial court properly determined that plaintiff's proposed amendment was futile.

Affirmed.

/s/ Pat M. Donofrio  
/s/ William B. Murphy  
/s/ Kirsten Frank Kelly